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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 605

SKOURAS THEATRES CORPORATION, THEATRE & CINEMA, INC., PHILHAMBRO, INC., YOUNGSTOWN THEATRE CORPORATION and MODERN PLAYHOUSES, INC.,
Petitioners,

v.

NICK C. SPANOS, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S MEMORANDUM IN OPPOSITION TO PETITION FOR CERTIORARI

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The Petition for Certiorari raises no questions warranting this Court's attention. The decision below is not only eminently correct but is narrowly and carefully confined to the equitable considerations involved in the application of a local court rule to the facts of this particular case. The broader constitutional questions discussed below were concededly unnecessary to

the decision.[1] That discussion with reference to constitutional privileges and immunities was designed not to resolve the rights of the parties to this action but merely to give advice to the legal world in general, being expressly premised on "the importance of the problem and the desirability of furnishing guidance to the bar." Pet. App. 25a. These advisory comments of the Second Circuit cannot qualify as grounds for certiorari since this Court "cannot give decisions which are merely advisory." *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 469.

I

The sole issue in this case is a most parochial one—can these petitioners avoid payment of reasonable *quantum meruit* compensation to this respondent for valuable legal services rendered under the circumstances here involved? The circumstances are these: The respondent Spanos rendered his legal services in California and New York at petitioners' express request both prior and subsequent to June of 1953 in connection with an 88 million dollar antitrust action petitioners filed at that time in the federal court for the Southern District of New York against practically all the major motion picture distributors in the United States [referred to herein as the "industry suit"]. The District Court found [235 F. Supp. at 16] that the petitioners had received substantial benefits from the industry suit and had arrived at settlements with

[1] Petitioners themselves refer to the decision below as one "unnecessarily deciding constitutional questions." Petition, p. 24. They also describe the Second Circuit's discussion of these questions as "an alternative ground for affirmance" of the District Court's judgment. Petition, p. 9.

some of the defendants therein prior to petitioners' discharge of Spanos without cause in October of 1958. But that industry suit still remains pending and, as of this date, untried as to the remaining defendants therein.

Spanos' *quantum meruit* claim has been resisted by his clients, the petitioners herein, on the novel premise that the lawyer of their own choosing, an eminent and highly qualified member of the California bar and of this Court's bar, was somehow engaged in the unauthorized practice of law in New York while working there by invitation of and in cooperation with petitioners' New York lawyers, who were representing and advising petitioners concerning their federal cause of action. In all three opinions below [those of the District Court, the Second Circuit panel and the Second Circuit sitting *in banc*] it was agreed that Spanos was repeatedly sought out by the petitioners as an expert in federal antitrust actions, that Spanos agreed to render his services to petitioners as an associate of the late Dean James M. Landis [who was one of petitioners' New York lawyers in the industry suit] and in addition as counsel to petitioners' attorney of the record in the industry suit—the New York law firm of Weisman, Cellar, Allan, Spett, & Sheinberg. It was further agreed that Spanos never appeared either in court or at depositions in connection with the industry suit except with local attorneys of record in that suit.

The alleged illegality of respondent Spanos' activities in this respect is said to spring primarily from his "having failed first to obtain admission . . . to practice before the [federal] District Court" on a *pro hac*

vice basis.[2] Petition, p. 3. Although petitioners nowhere make it clear, this "failure" which they seek by repetition to ascribe to Spanos is really their own. Only petitioners through their attorney of record in the industry suit ever had the legal status to have Spanos admitted *pro hac vice* in that suit. Rule 3(c) of the local rules for the Southern District of New York, which controls *pro hac vice* admissions, expressly provides that such admission is secured by "motion." Under federal procedure and practice [see Rules 7(b)(2) and 11 of the Federal Rules of Civil Procedure], motions in a particular federal case can only be made by the attorney of record in the case. *First Iowa Hydro Electric Co.* v. *Iowa-Illinois Gas & Electric Co.*, 245 F. 2d 613, 629 (C.A. 8). Thus the scene conjured up by petitioners' contention, the scene wherein Spanos presents himself alone to move his own admission in the industry suit without regard to the presence, desires or obligations of petitioners' attorneys of record, simply cannot be played in the District Court for the Southern District of New York.

On this point, the District Court specifically found (235 F. Supp. at 12) that petitioners' own "resident New York lawyers knew the facts and would seem to have had some obligation to call the relevant sections of the New York Penal Law to his [Spanos'] attention and to move the admission of Spanos *pro hac vice* if this were necessary to avoid a violation of law or unprofessional conduct on his part." And the *in banc* Court of Appeals, after noting that Spanos' employ-

[2] Petitioners also assert half-heartedly that Spanos also failed to obtain admission to the New York state bar. But the main controversy and the decisions below relate only to the absence of Spanos' *pro hac vice* admission to practice before the Southern District pursuant to Rule 3(c) of that Court.

ment contemplated court appearances on his part, held that when the petitioners "engaged him to that end, they impliedly assumed the obligation of having their New York lawyers in the action make any motion that was necessary to render such appearances lawful." Pet. App. 24a.

Moreover, the District Court below, the same District Court that would have passed upon any motion for Spanos' *pro hac vice* admission in the industry suit, found that "at any time on motion, the admission of Spanos *pro hac vice* would have been authorized by this Court." 235 F. Supp. at 11. This finding came after hearing days of testimony, during which petitioners dredged up whatever "evidence" they thought they had to support their contention that their own lawyer, Spanos, was not worthy of admission *pro hac vice* in the very court before which they had hired him to serve. And the District Court declared that the record thus made did not even reflect a suggestion of any basis for the denial of admission to Spanos. The *in banc* Second Circuit agreed with that finding. Pet. App. 24a. Indeed, the original Second Circuit panel majority and the *in banc* dissenters were implicitly in agreement as to Spanos' integrity. Many of the factual statements in the Petition are directed to what petitioners call improper activities of Spanos in matters other than the industry suit. But none of the findings below nor the record itself gives any support for such alleged improprieties.

Petitioners are thus left urging that as the result of their own failure to obtain Spanos' *pro hac vice* admission Spanos has violated a New York criminal statute respecting the illegal practice of law. They urge that contention even though Spanos did not hold

himself out as a New York lawyer, gave no advice concerning New York law and had no occasion to appear of record in the federal courtroom in pursuit of petitioners' federal claim. And having discharged Spanos before any contemplated court appearances on his part could occur, appearances wherein a *pro hac vice* admission would have been necessary and would most assuredly have been granted, petitioners can point only to their own failure to insist upon a most needless formality of a *pro hac vice* admission on some unidentified and unidentifiable occasion as the basis of Spanos' alleged illegal activities. From this welter of inconsistencies the petitioners would draw the impossible and inequitable conclusion that they are now free to disregard all their financial obligations to Spanos and to retain, without any cost to them, all the legal advice and benefits rendered them by Spanos over a five-year period.[3]

This conclusion was rightly rejected by the courts below after a thorough analysis of the facts and the governing principles of law. Petitioners here seek nothing more than a flat denial of the overriding general policy of the law, as Mr. Justice Holmes put it, "of preventing people from getting other people's property for nothing when they purport to be buying it." *Continental Wall Paper Co.* v. *Louis Voight & Sons Co.*, 212 U.S. 227, 271 (dissenting opinion), quoted with approval in *Kelly* v. *Kosuga*, 358 U.S.

[3] Petitioners sought by counterclaim to recover back the compensation actually paid Spanos during the five years of his service, thus obtaining all of his services for nothing. The lower courts all rejected that counterclaim. See Pet. App. 20a. As it reaches this Court, the controversy concerns only the *quantum meruit* claim for additional compensation.

516, 520-521. And they would deny that fundamental policy by exploiting their own failure to fulfill what was in any event their own obligation. No reason exists why this Court should further dignify petitioners' effort "to obtain [Spanos'] expert legal assistance" without "paying the bill," Pet. App. 27a.

II

The relevant facts in this case reveal a situation that is a common everyday occurrence in federal practice, a situation so utterly devoid of impropriety as to render petitioners' claims frivolous. Actually, the facts are such that if petitioners' charges of illegal practice of the law were to be recognized a most dangerous precedent would be established, threatening the livelihood and reputation of countless legal experts who are called from outside their home states to advise and aid in the prosecution and defense of complex federal causes of action.

The respondent Spanos was employed by petitioners with full knowledge that he was not a member of the New York bar. He was employed precisely because of his expertise in the federal antitrust aspects of the motion picture industry. He was called from California to advise the petitioners and their New York attorneys concerning the multi-million dollar treble damage action that they desired to file against certain leaders in the nationwide motion picture distributing industry and certain theatre operating affiliates, an action charging violations of the antitrust laws throughout the United States. See 235 F. Supp. at 5. And his employment came, with petitioners' full authorization, at the express invitation of one of the prominent New York lawyers who were already repre-

senting the petitioners in this matter. The legal services for which Spanos here seeks compensation were at all times in aid of and in association with these lawyers, who were concededly members of the New York bar.

Spanos commenced work on this industry suit about six months prior to the filing of the complaint in the Southern District federal court.[4] He did so on a contingent basis, augmented by a minimum base pay. See 235 F. Supp. at 5-6. And he was required to agree not to accept any further or future employment which would in any way interfere with his work on the industry suit. So complete was Spanos' commitment to this matter that he was forced to reduce fees on matters he was already handling for other clients by $260,000. See 235 F. Supp. at 17.

Spanos performed his various services both in California and New York,[5] and the petitioners received and utilized the benefits of those services during the five years preceding their discharge of him in 1958. As the Court of Appeals noted, the contract engaging Spanos "can fairly be construed as contemplating court appearances on his part." Pet. App. 24a. In point of

[4] Obviously there was no basis whatever for seeking Spanos' admission to practice *pro hac vice* in the Southern District prior to the institution of the industry suit in that court. Yet petitioners would deny compensation to Spanos for that pre-litigation period because of the failure to have him admitted *pro hac vice!*

[5] From 1953 to 1955 Spanos discharged his obligations without moving his residence from California to New York and actually performed some of his research functions in California. In 1955 he temporarily moved from California to New York as a matter of convenience to his clients. But petitioners would withhold compensation for the work done in California, the theory apparently being that it was done in violation of the penal laws of New York!

fact, for reasons beyond Spanos' control since he was not the attorney of record, the progress of the industry suit was so slow and the dormant intervals became so extended that these contemplated court appearances never took place prior to the discharge. As a result, Spanos' principal contributions to the case were described by the District Court in these terms (235 F. Supp. at 11):

> "Whatever may have been his hope or belief at the outset, plaintiff [Spanos] acted primarily as a consultant to the New York lawyers. He did, of course, work directly with George Skouras and others in the Skouras companies but this did not so much involve abstract legal advice as it did a study of the facts, an analysis of correspondence and other records, and the rendering of assistance to George in preparing on the facts for his deposition. Spanos was not an attorney of record and never acted for defendants in court or during any pretrial procedures (except as a spectator). He drew no pleadings or other court papers. He helped members of the New York bar in connection with pleadings and other papers in the industry suit but did nothing on his own responsibility."

The original 1953 understanding between petitioners and Spanos, under which these various services were performed, continued unchanged until 1956. At that time certain of petitioners' New York counsel withdrew from the industry case. Petitioners thereupon entered into a written retainer agreement with the New York law firm of Weisman, Cellar, Allan, Spett, & Sheinberg, whereby that firm was to be the "sole and only attorneys working for [petitioners] in the [industry suit] and shall continue as [petitioners'] sole attorneys of record." 235 F. Supp. at 8. This written retainer further fixed upon petitioners the responsibility for arranging that the Weisman firm

would continue to have the "aid and cooperation of Nick Spanos." 235 F. Supp. at 8. This proviso, according to the testimony of both George Skouras and Weisman, was included at the express request of Weisman (A168, A227, 108a.) Weisman himself made clear (A220, A225) that "I was in charge of the matter, I fixed all policy, I had all the conferences . . . [Spanos] took orders from me such as I sought to give." Weisman at another point testified that his wish to have Spanos' help in the industry suit persisted until he learned of Spanos' discharge by petitioners (A227).

It is against the background of these facts that petitioners have asserted that, absent a *pro hac vice* admission to practice before the Southern District, Spanos was engaged in the illegal practice of law in New York. Yet clearly this is a situation that is very typical of that existing in most major federal court litigation—a gathering together of specialized lawyers dealing with those aspects of the case in which they are respectively skilled. Many of the lawyers in such groups are members of the bar of the state in which the litigation is brought; others are not. It is a picture repeated time and again in federal litigation involving such complex matters as antitrust claims, patents, copyrights, taxation and various forms of governmental regulations. Many of these cases, like the instant one, concern nationwide clients, nationwide problems and nationwide expertise. And when, in those cases, a large number of lawyers are employed from around the country it is neither customary nor appropriate for one of the local attorneys of record to move the *pro hac vice* admission of each of the out-of-state attorneys unless and until they are about to participate in the trial or otherwise address the court.

To assert that such an out-of-state attorney, who does no more than advise or do research on the federal

claim, is practicing law in violation of local criminal statutes in the absence of securing his *pro hac vice* admission in the federal court is to elevate the *pro hac vice* concept far beyond its purpose. Such an admission to practice is at most a "formal ritual of a particular court," *Schifrin* v. *Chenille Mfg. Co.*, 417 F. 2d 92, 94 (C.A. 2), and failure to comply with any rule respecting *pro hac vice* admission is generally deemed to be a "mere inadvertence" that affects no rights of the litigants, *United States* v. *Bradford*, 238 F. 2d 395, 397 (C.A. 2). See also *In re Miltones, Inc.*, 286 F. 806, 809 (C.A. 2). No one besides petitioners has ever suggested that *pro hac vice* admission, particularly before the occasion for such admission arises, is necessary in order to avoid the charge of illegal practice of law or in order to obtain the payment of fees by the lawyer's own clients. Petitioners' contentions would condemn as criminal the activities of most out-of-state lawyers involved in the massive activities necessary to major federal court litigation, and would further make criminal all activities of out-of-state lawyers concerning federal matters not yet in litigation. Those contentions find no support whatever in federal jurisprudence. And certiorari should not be granted merely to confirm the rejection which those contentions deserve and have received in the courts below.

III

The critical elements of the *in banc* decision below was a rejection of petitioners' claim that they could consider their contract with Spanos as unlawful and unenforceable when they had discharged Spanos before fulfilling their obligation to secure his admission when appropriate on a *pro hac vice* basis under Rule 3(c) of the Southern District's Rules. See Pet. App. 24a-25a. As the District Court had ruled, such an

admission would undoubtedly have been authorized had it been sought upon an appropriate occasion. And petitioners' action in discharging Spanos prior to the conclusion of the case, thereby foreclosing any opportunity that might have arisen to secure his admission, was held to preclude petitioners from taking advantage of any possible adverse inference to be drawn from the failure to secure his admission.

The decision below thus rests squarely on the equitable considerations implicitly involved in local Rule 3(c). In effect, the *in banc* court, as distinguished from the Second Circuit panel, ruled that petitioners' own actions and inactions could not prevent the protective federal umbrella of Rule 3(c) from extending over the entire period of Spanos' employment—particularly for purposes of securing what was rightfully owed him.

This narrow *in banc* ruling was acknowledged by the court to "suffice to dispose of the case." Pet. App. 25a. So viewing the ruling, no basis appears for invoking this Court's certiorari jurisdiction. The equitable considerations involved in the application of a local court rule, especially for the stated purposes, are matters traditionally left to the court and the Circuit involved. And the rule has here been interpreted and applied in a manner so consistent with the equities and realities involved as to create no conflict of decision and no issue of national significance justifying attention by this Court.

IV

Various other questions tendered by petitioners, some of them couched in constitutional terms, were either not decided below, not necessary to the decision rendered, or involve purely factual considerations. Such questions cannot qualify for review by this Court.

Thus petitioners' effort to obtain a ruling by this Court as to whether the respondent Spanos engaged in the unauthorized practice of law in violation of Sections 270 and 271 of the New York Penal Law involves a matter which the Second Circuit found unnecessary to decide. See Pet. App. 26a. It was enough to insulate a lawyer against any possible unauthorized practice charge, as petitioners have consistently recognized, if there was some form of compliance with the *pro hac vice* provisions of the Southern District's Rule 3(c), and the Second Circuit has ruled that in the administration of that rule the petitioners cannot take advantage of their own actions and inactions in preventing compliance. Hence it became unnecessary for the court "to endeavor to predict whether the New York Court of Appeals would consider Spanos' conduct" violative of the New York Penal Law. Pet. App. 26a.[6]

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[6] In any event, Spanos' conduct was not violative of the New York Penal Law. The sole case relied on for the contrary conclusion is *Spivak* v. *Sachs*, 16 N.Y. 2d 163, 263 N.Y.S. 2d 953. But in that case an out-of-state lawyer injected himself into a New York matrimonial controversy and rendered advice in New York on matters of New York law; he was not acting at the invitation of or in cooperation with New York counsel. His application for fees, payable not by his client but by the adverse spouse, was denied on the ground that he was illegally practicing law in New York. The distinctions between *Spivak* and the instant case are obvious. The respondent Spanos was at the very least engaged solely in giving advice in matters of *federal* law, not New York law. New York courts have recognized the inapplicability of the *Spivak* ruling where the legal activities relate solely to federal matters. See *Faerber* v. *Kertess*, N.Y. Sup. Ct., Westchester Cty., reported in 155(90) New York Law Journal, p. 20, col. 2T, May, 9, 1966; also noted in Clark's Digest, Vol. 30, No. 5, p. 50 (May, 1966). In that case the action of an out-of-state attorney in conferring and advising with a client in New York concerning a Presidential pardon from a federal conviction was held not to constitute illegal practice of law under the New York Penal Law.

Moreover, the various comments of the Second Circuit concerning the constitutional privileges and immunities of citizens of the United States were not essential to or a necessary part of the decision below. The actual disposition of the case by the Second Circuit was in terms of the equitable considerations involved in the application of Rule 3(c). What was said with reference to constitutional considerations was in the nature of an advisory opinion, written solely because of "the importance of the problem and the desirability of furnishing guidance to the bar." Pet. App. 25a. Petitioners themselves recognize the advisory and unnecessary nature of this portion of the opinion below. See Petition, pp. 9, 24, as quoted in footnote 1 herein, *infra*. Such an advisory opinion cannot, of course, be reviewed by this Court. *Muskrat* v. *United States,* 219 U.S. 346; *Alabama* v. *Arizona,* 291 U.S. 286.

The final question suggested by petitioners, concerning the District Court's finding as to diverse citizenship in support of its jurisdiction in this case, presents no issue of a legal or important nature. Whether Spanos was or was not a New York resident is a purely factual matter, resolved as such by the District Court and affirmed on that basis by the Second Circuit panel. See Pet. App. 14a. And, in any event, jurisdiction is here sustainable on the alternative basis of the federal nature of Spanos' compensation claim, related as it is to his activities in a federal court case and the applicability of a federal court rule. See Pet. App. 16a-18a.

V

As already indicated, the contentions advanced here by the petitioners would directly inhibit and impinge upon the long established federal practice of calling

together a variety of legal experts from around the country to work upon complicated matters of federal litigation. Indeed, that very impingement would also constitute an intrusion upon the power of the federal courts to control the litigation before them and to determine who may and may not advise, work and appear in that litigation.

This Court has consistently recognized that federal courts are not compelled in all instances to subordinate themselves to the bar requirements and regulations of the various states. See *Theard* v. *United States*, 354 U.S. 278. Federal courts should be particularly free to establish their own concepts of the proper practice of law before them, and to determine the reasonable fees chargeable, when dealing with cases of a federal nature. See *Sperry* v. *Florida*, 373 U.S. 379, 385: "A State may not enforce licensing requirements which, though valid in the absence of federal regulation, give 'the State licensing board a virtual power of review over the federal determination' that a person or agency is qualified and entitled to perform certain functions . . ."

And so in this instance the Second Circuit has done no more than insist upon the power of federal courts to determine the propriety of the activities of those in some manner involved in cases pending before them. It has done so in a manner that gives due recognition to the right of qualified attorneys to move freely about the several states, conferring and advising on federal matters of a complex and interstate nature. See *Cooper* v. *Hutchinson*, 184 F. 2d 119, 122 (C.A. 3); *Cochran* v. *Burdick*, 70 F. 2d 754, 756 (App. D.C.); *Tuppela* v. *Mathison*, 291 F. 728, 730 (C.A. 9); and see 28 U.S.C. § 1404, dealing with the transfer of cases

from one federal court to another. The court has confirmed that right without hobbling it with unrealistic insistent upon compliance with meaningless rituals or irrelevant state laws.

The Second Circuit's action, moreover, reflects a sensible rejection of petitioners' concept that they fall within "a very strange class of private attorneys general," *Kelly* v. *Kosuga,* 358 U.S. 516, 520, able to invoke state criminal laws and have their own attorney found guilty of unauthorized practice of the law. If there is to be any sanction for unauthorized or illegal practices, it is the function of the appropriate state or federal authorities, rather than a private client-citizen, to invoke that sanction. For a client to avoid payment of a reasonable and just fee, under the guise of protesting what such authorities have not seen fit to protest, is to subvert both the attorney-client relationship and the supervisory power of courts over those engaged in the practice of law.

Thus the Pandora's box which petitioners would open more than justifies the determination reached by the Second Circuit and warrants the rejection of the Petition herein.

CONCLUSION

For these various reasons, the Petition for a Writ of Certiorari should be denied.

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